FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

No. 31

I. C. SUTTON HANDLE FACTORY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

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No.

I. C. SUTTON HANDLE FACTORY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

The opinion herein of the United States Court of Appeals for the Eighth Circuit is not yet reported; a copy of the opinion is appended hereto and marked Exhibit A.

Decision was rendered by the Court of Appeals for the Eighth Circuit on June 11, 1958, and entered on July 2, 1958.

Petition for rehearing was denied on July 28, 1958.

An order was entered by the Court of Appeals for the Eighth Circuit on August 7, 1958, granting petitioner thirty (30) days from July 28, 1958, in which to file a petition for writ of certiorari and the record in the Supreme Court of the United States, staying the requirement of petitioner's compliance with direction of the National Labor Relations

Board during such period, and providing further that such stay should continue until the final disposition of the case by the Supreme Court of the United States if within said thirty days period there be filed with the National Labor Relations Board a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed.

The statutory provision believed to confer jurisdiction in the Supreme Court of the United States is 62 Statutes 928, Title 28, Section 1254, Federal Code Annotated, which reads in part: "Cases in the Courts of Appeals by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree: * * *"

The question presented for review is: In affirming an order by the National Labor Relations Board directing reinstatement of an employee alleged and found by the Board to have been discharged because of union activities, is the Court of Appeals at liberty to disregard the uncontradicted evidence of the employer that the employee was discharged for cause?

The Court of Appeals reviewed and affirmed an order of the National Labor Relations Board which, in part, directed petitioner to re-instate as his employee one Joe Hulsey. This order resulted from proceedings instituted before the Board against petitioner by United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union 2746, under the Labor Management Relations Act.

This employee was discharged on October 24, 1956, for the employer's stated reason that Hulsey was visiting and wasting time on the job (Record, p. 15, Testimony of I. C. Sutton). Petitioner had no knowledge of union activities

in his plant until so advised by the union representative, Mr. Mowery, on October 26, 1956, two days after the discharge of Hulsey (Record, pp. 14-15, Testimony of I. C. Sutton).

From April to October 26, 1956, certain of the employees had quietly carried on union organizational work in petitioner's plant (Testimony of Joe Hulsey, Record, p. 13). Pursuant to a representative petition filed October 29, 1956, by United Brotherhood of Carpenters and Joiners of America, Local Union 2746 (hereinafter called "charging party"), a consent election was held in petitioner's plant in Harrison, Arkansas, January 8, 1957. This election resulted in a tie vote except for the challenged ballot of Joe Hulsey (Stipulation No. 1, Record p. 3). Joe Hulsey's vote was challenged by petitioner as being cast by a man who was no longer his employee. The charging party alleged in its complaint with which this case was initiated that Hulsey had been illegally discharged because of his membership in and activities on behalf of the union (Complaint, Record, p. 3). Following a hearing, the Board's referee found that Hulsey was illegally discharged because of union activity (Referee's Intermediate Report, Record, pp. 30-37). This finding was adopted by the Board (Decision and Order of the National Labor Relations Board, Record, p. 19). Petitioner's request to have this order set aside was denied by the United States Court of Appeals for the Eighth Circuit (Opinion, Exhibit A herein). In that opinion, the Court of Appeals wrote and held: "The Board, as the trier of the facts, was not compelled to accept at its face value the testimony of the petitioner, a highly interested witness, even though it was uncontradicted."

The Court of Appeals committed error in holding that the Board does not have to accept at face value the uncon-

tradicted testimony of an employer that he had discharged an employee for cause because such holding is contrary to the provisions of the Administrative Procedures Act, 5 U.S.C.A., Section 1001, *et seq.* (the applicable portion of which act is appended hereto and marked Exhibit B), and contrary to the holding of the Supreme Court of the United States in the case of *Universal Camera Corporation v. N.L.R.B.*, 71 S. Ct. 456, requiring that in arriving at the substantiality of evidence, the trier of facts must consider the whole record.

It was urged before the Court of Appeals that there is no substantial evidence to support the Board's order nor the findings on which it is based. This position was taken from the first when petitioner made objection to this effect to the Intermediate Report of the Board's Referee (Record, p. 42).

The referee dismissed petitioner's explanation for the discharge as being not worthy of belief. He assigned and expounded two reasons for his holding:

(1) Petitioner discharged Hulsey without warning despite the facts that Hulsey had worked for three and one-half years without any complaint having been made to him about his work (Examiner's Report, Record, p. 33), and,

(2) Petitioner made statements to other employees subsequent to the discharge that he had fired Hulsey "for wasting time while trying to form a union". (Examiner's Report, Record, p. 33).

Neither of these reasons can stand as a matter of law.

As to the first, it is sufficient to note that the Board is not authorized to substitute its judgment for that of the employer as to what is sufficient cause for discharge.

N.L.R.B. v. Williamson-Dickie Mfg. Co., (C.C.A. 5) 130 F2d 260, 264; 56 C.J.S. 245, Section 28(66)b.

As to the second, these statements cannot be considered legally sufficient as impeachment of the employer's credibility of testimony by him that he was ignorant of the employee's union activities at the time of the discharge because: (1) The statements, being susceptible of contrary inferences, establish neither one inference nor the other (*Bussman Mfg. Co.* v. *N.L.R.B.*, (C.C.A. 8) 11 F2d 783, 786-7) and (2) If these statements, although apparently contradictory to petitioner's testimony, can be reconciled with that testimony, then they cannot be held to be contradictory and thus be regarded as impeaching his credibility. 98 C.J.S., p. 558, Sec. 583.

That the Court of Appeals for the Eighth Circuit is familiar with these elementary legal principles cannot be doubted when we read that Court's language in *American Smelting and Refining Co.* v. *N.L.R.B.*, (C.C.A. 8) 126 F.2d 680: "* * * But it remains true that the discharger knows the real cause of discharge; it is a fact to which he may swear. If he says it was not union membership or activity, but something else which in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying. There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point."

But disregarding this previous announcement, the Court of Appeals wrote in the instant case, "We are satis-

fied that, from the circumstances surrounding Hulsey's discharge, the Board reasonably could infer that his separation from his employment just as the crucial stage in the campaign of the union to organize the petitioner's plant had been reached, was the proximate result of his union activities."

One of the "circumstances" surrounding Hulsey's discharge is reflected in Sutton's testimony that Hulsey was discharged for wasting time. As a matter of law, Sutton's credibility has not been destroyed, nor has his testimony been substantially contradicted. His explanation together with evidence in confirmation of that explanation are still part of this record. And as long as it is, can it be held that the Board has discharged its burden of proof to establish by substantial evidence that Hulsey was discharged because of union activity?

Petitioner therefore prays the Supreme Court of the United States that this petition be granted; that a writ of certiorari be issued herein to the Court of Appeals for the Eighth Circuit; and that upon final hearing hereof, judgment be entered reversing the holding of the Court of Appeals for the Eighth Circuit, and directing that Court to make findings of fact in keeping with the law.

Respectfully submitted,

/s/ ROBERT W. CUMMINS,
P. O. Box 744,
Harrison, Arkansas,
Attorney for Petitioner.

I, Robert W. Cummins, attorney for Petitioner, after being duly sworn, upon my oath do certify that I have on

this August 16, 1958, by certified air mail, sent a copy of this petition for writ of certiorari to the following:

National Labor Relations Board, Washington, D. C.;
Frederick U. Reel, attorney of record for the National Labor Relations Board, Washington, D. C.;
The Solicitor General, Department of Justice, Washington 25, D. C.

/s/ Robert W. Cummins.

Subscribed and sworn to before me this August 16, 1958.

/s/ Len Jones,

(Seal) Notary Public, Boone County, Arkansas.

EXHIBIT A.

Opinion of the United States Court of Appeals for the Eighth Circuit.

No. 15942.

I. C. Sutton Handle Factory, Petitioner, vs. National Labor Relations Board, Respondent.	Petition to Review Order of National Labor Relations Board.

June 11, 1958

Before Sanborn, Vogel and Matthes, Circuit Judges.

Sanborn, Circuit Judge.

I. C. Sutton, Sr., doing business as I. C. Sutton Handle Factory, at Harrison, Arkansas, has petitioned this Court for the review and reversal of an order of the National Labor Relations Board, the practical effect of which is (1) to disable the petitioner from interfering in any way with the union affiliations and activities of his employees; (2) to require the reinstatement, with back pay, of Joe Hulsey, found by the Board to have been discriminatorily discharged; and (3) to post the usual notices.

The petitioner asserts that there was no adequate evidentiary basis for the Board's findings and order. This the Board denies, and it asks that the order under review be enforced.

There is nothing unusual about this controversy. It falls within a familiar pattern, growing, as it does, out of

things that were done and things that were said during a campaign started in the spring of 1956 by the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union 2746, to organize the employees of the petitioner, among whom Joe Hulsey was the most active union advocate and proponent.

A detailed discussion of the evidence, with which the parties are entirely familiar and which can be of little interest to others, is unnecessary. It is enough to say that there was substantial evidence before the Board from which, in our opinion, it reasonably could infer that the petitioner was opposed to the unionization of his employees; that his supervisors at the plant asked questions of, and made remarks to, the employees, during the campaign, which were calculated to discourage and deter them from becoming members of the union; and that, at the very height of the union campaign, Joe Hulsey, on October 24, 1956, the day after he had mailed to the union a number of applications by employees for membership in the union, was discharged.

It is obvious to us that the questions whether the petitioner had, by interrogation, threats, or otherwise, in violation of Section 8(a)(1) of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C., Sec. 151 *et seq.*), interfered with the rights of his employees to do as they pleased about joining or not joining the union, and whether, in violation of Section 8(a)(3) and (1) of the Act, the petitioner had discharged Joe Hulsey because of his union activities, were questions of fact for the Board, and are not questions of law for this Court.

The contention of the petitioner is that because his testimony that Hulsey was discharged "for visiting and interfering with others' work" was uncontradicted, the Board was precluded from finding that Hulsey's discharge

was motivated by his union activities. The record shows that Hulsey had been employed by the petitioner for more than three years, and that during that time no complaints had been made about his work. We are satisfied that, from the circumstances surrounding Hulsey's discharge, the Board reasonably could infer that his separation from his employment just as the crucial stage in the campaign of the union to organize the petitioner's plant had been reached, was the proximate result of his union activities. The Board, as the trier of the facts, was not compelled to accept at its face value the testimony of the petitioner, a highly interested witness, even though it was uncontradicted. See and compare *Noland* v. *Buffalo Insurance Co.*, 8 Cir., 181 F. 2d 735, 738, and cases cited. The law applicable to cases such as this has been repeatedly stated in the decisions of this Court and of Courts of Appeals of the other Circuits. This case differs in no controlling respects from *National Labor Relations Board* v. *Minnesota Mining & Manufacturing Co.*, 8 Cir., 179 F. 2d 323; *Coca-Cola Bottling Co. of St. Louis* v. *National Labor Relations Board*, 8 Cir., 195 F. 2d 955, and *National Labor Relations Board* v. *Cold Spring Granite Co.*, 8 Cir., 208 F. 2d 163.

We find nothing in the record which would justify a reversal of the order under review or a refusal by this Court to enforce it.

The request of the Board for the enforcement of its order is granted.

EXHIBIT B.

Applicable Portions of the Administrative Procedures Act, 60 Statutes 241, Federal Code Annotated, Title 5.

Federal Code Annotated, Section 1006(c): "Evidence. * * * and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record * * *."

Section 1009. Judicial Review: (e) Scope of Review: "* * * In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, * * *".

ILE COPY

FILED
OCT 7 1958
JAMES R. BROWNING, Clerk

No. 315

In the Supreme Court of the United States

OCTOBER TERM, 1958

I. C. SUTTON HANDLE FACTORY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

J. LEE RANKIN,
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Washington 25, D.C.

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In the Supreme Court of the United States

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. A1-A3) is reported at 255 F. 2d 697. The National Labor Relations Board's findings of fact, conclusions of law, and order (R. 18-42) are reported at 119 NLRB No. 130.

JURISDICTION

The judgment of the court below was entered on July 2, 1958, and petition for rehearing was denied on July 28, 1958. The petition for a writ of certiorari was filed on August 27, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and

Section 10(f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the Board, in finding that petitioner discharged an employee in violation of Section 8(a)(3) and (1) of the Act, erred in not accepting the testimony of the employer as determinative of the motive for discharge.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth *infra*, pp. 8-10.

STATEMENT

A. The Board's Findings of Fact

In the spring of 1956, the United Brotherhood of Carpenters and Joiners of America, Local Union 2476, commenced a campaign to organize petitioner's employees (R. 23-24; 12).[1] Employee Joe Hulsey, whose discharge is here involved, became the most active union protagonist (R. 23-24; 7, 12, 13).

Petitioner's hostility to the Union was apparent from the early days of the organizing campaign. In April, Supervisor McCutcheon told employee Yancey that "Mr. Sutton said he was going to fire everyone that had anything to do with the union," and the following month McCutcheon expressed his fears to Yancey that, if the employees joined the Union, peti-

[1] "R." references are to the record filed by petitioner; "S" references are to the Supplemental Record filed by the Board in the court below.

tioner would shut down or move the factory. In June, Foreman Claiborne told employee McElroy that "if they found out who was pushing it [the Union] so hard, they might lay him off," and added, "I think it was Joe Hulsey" (R. 25, 30; 9-10). Harry Sutton, a supervisor and the son of the proprietor, stated that "we suspected Hulsey from the start" (R. 30; 10, S. 13). Prior to this time petitioner had employed Hulsey for three years, regarded him as an able and hard worker, had complimented him on his work, and had never had occasion to criticize him (R. 33; 12, 9, 11, 16).

By October 22, over 20 of petitioner's 37 employees had signed applications for union membership (R. 24; 12, 6). On the morning of October 23, Hulsey, accompanied by employee Onas Chaney, mailed a number of cards to the Union (R. 24; 5, 12). After their arrival at work that day, Hulsey and Chaney told several employees that a majority had signed cards and that the cards had been mailed to the Union (R. 24; 5, 6, 9). By the end of the day this information had circulated "pretty well through the plant" (R. 24; 5, 6, 9, S. 4). The next morning at 11:00 a.m., I. C. Sutton, Sr., saw Hulsey and four other employees in the restroom (R. 31, 34; 15, S. 12). Sutton did not testify that Hulsey had been in the restroom for an unduly long time, or that he was responsible for the presence of the other employees, or that he had been detaining them (R. 34; 15). Sutton, however, promptly inquired of Foreman Claiborne how much time Hulsey "had been losing lately," and Claiborne replied that Hulsey spent a consider-

able amount of time visiting (R. 34; 15).[2] That afternoon petitioner discharged Hulsey (R. 24; 13, 15).

During the next few days Sutton explained to several employees his reason for discharging Hulsey. Sutton told employee Manes (R. 35; 11, S. 10):

> Joe Hulsey was a good guy, good worker, but he got in the toilet and tried to form a union. I had to let him go. I would any other boy.

Similarly, Sutton stated to employee Davis (R. 35; 11, S. 11):

> Joe made a good hand and he worked hard but tried to organize that —— —— union and I had to fire him.

In like vein, Sutton separately advised employees Chaney, McElroy, and Wells that he discharged Hulsey for "organizing the toilet union" (R. 35; 5, 11, 48, S. 3, 7). At few months later, Sutton said to McElroy, "If a man wanted communism he didn't have to go to Russia to get it, just get into the union," and added, "Union or no union . . . Joe Hulsey and Tom Cox wasn't going to come back up there and run [the] business for [Sutton]" (R. 35; 10, S. 8). As a witness, however, Sutton testified that he discharged Hulsey "for visiting and interfering with others' work" (R. 15).

---

[2] Although several of petitioner's witnesses testified that during the four to six weeks preceding Hulsey's discharge the supervisors had complained to Sutton concerning Hulsey's wasting time, neither Sutton nor the supervisors ever warned Hulsey or admonished him about his alleged misconduct (R. 33; 16, 15, 17, 48, 47, S. 12).

On October 26, two days after Hulsey's discharge, Sutton summoned five employees to separate interviews in his office in an effort to ascertain why the employees were dissatisfied (R. 25; 15, 4, 6, 9, 10, 11). Sutton asked each of these employees whether he had signed a union card (R. 26; 16). He stated to employee Chaney that if the Union were voted in, the plant would be shut down, told employee McElroy that if the union came in, the plant would not "operate near as much," and observed to employee Davis that factories were moving south to get away from unions (R. 26, 27-28; 4, S. 2-3, 7, 11). On the same day, Foreman Claiborne told Davis that if the Union came in, the plant would run "six months out of the year," and the employees "who voted against the union would get a better deal than the ones who vote with it" (R. 29; 12). During the following months Claiborne repeated to various employees his prediction that advent of the Union would cause the plant to shut down for six months out of the year, and his warning that preference would be shown the anti-union employees (R. 29; 7, 8, 10, 11).

B. The Board's Decision and Order

Rejecting the contention that Hulsey's union activities had nothing to do with his discharge, the Board concluded that petitioner had violated Section 8(a)(3) and (1) of the Act by the discharge of Hulsey, and, further, that it violated Section 8(a)(1) by interrogating and threatening other of its employees with respect to their union activities (R. 19, 28, 37).

The Board accordingly ordered petitioner to cease and desist from violating Section 8(a)(3) and (1)

of the Act, and affirmatively to reinstate Hulsey with back pay, and to post appropriate notices (R. 20-21).

C. The Decision of the Court Below

The court below, following its earlier decisions in *National Labor Relations Board* v. *Minnesota Mining & Manufacturing Co.*, 179 F. 2d 323; *Coca-Cola Bottling Co. of St. Louis* v. *National Labor Relations Board*, 195 F. 2d 955; and *National Labor Relations Board* v. *Cold Spring Granite Co.*, 208 F. 2d 163, and acknowledging like holdings from other circuits (Pet. A3), enforced the order of the Board. More particularly, the court below found that the record contained substantial evidence from which the Board could reasonably infer that petitioner was opposed to unionization of the employees; that petitioner's supervisory personnel had engaged in proscribed activity during the course of the organizing campaign designed to discourage petitioner's employees from becoming members of the union; and that Hulsey had been discharged because of his union activities (Pet. A2). Referring to Sutton's testimony that the discharge was "for visiting and interfering with others' work," the court noted that the "Board, as the trier of the facts, was not compelled to accept at its face value the testimony of the petitioner, a highly interested witness, even though it was uncontradicted" (Pet. A3).

ARGUMENT

The sole issue presented on this record, whether substantial evidence supports the findings of the Board, is not one warranting review by this Court.

General Pictures Corp. v. *Western Electric Co.*, 304 U.S. 175, 178; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. Petitioner attempts to distill an issue of law from the comment of the court below that the Board was not compelled to accept the testimony of "a highly interested witness, even though it was uncontradicted" (Pet. A3). Aside from the fact that Sutton's testimony as to the reason for the discharge was in fact contradicted (see *supra*, p. 4), the rule of law as stated by the court below is correct, and there is no conflicting authority. See *Quock Ting* v. *United States*, 140 U.S. 417, 420; *National Labor Relations Board* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 86 (C.A. 9), affirmed, 346 U.S. 482.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,

THOMAS J. MCDERMOTT,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

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National Labor Relations Board.

OCTOBER 1958.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U.S.C. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (c) * * * If upon the preponderance of the testimony taken the Board shall be of the

opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree

enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact is supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *